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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MARINA COAST WATER DISTRICT,

Plaintiff and Appellant,

v.

CALIFORNIA COASTAL
COMMISSION,

Defendant and Respondent;

CALIFORNIA-AMERICAN WATER
COMPANY,

Real Party in Interest and
Respondent.

H045468

(Santa Cruz County

Super. Ct. No. 15CV00267)

I. INTRODUCTION

Appellant Marina Coast Water District (Marina Coast) is a public utility that provides water service to the City of Marina and its vicinity.¹ Real party in interest California-American Water Company (Cal-Am) is a corporation that provides water service to customers on the Monterey Peninsula.

¹ We take judicial notice of this court's opinion in the previous appeal in this matter (*Marina Coast Water District v. California Coastal Commission* (Oct. 26, 2016, H042742) [nonpub. opn.] (*Marina Coast I*)). Some background facts and procedural history have been taken from the previous opinion.

Cal-Am constructed and operated a temporary test slant well on private beach property in Monterey County. The purpose of the test slant well was to gather technical data regarding the feasibility of a subsurface water intake system for a potential future desalination project. In earlier proceedings in this matter, Marina Coast challenged the approval by respondent California Coastal Commission (Coastal Commission) of Cal-Am's application for a coastal development permit for the test slant well. In *Marina Coast I*, this court affirmed the trial court's August 24, 2015 judgment, which denied Marina Coast's petition for writ of mandate setting aside the Coastal Commission's decision to approve the coastal development permit.

The special conditions attached to the coastal development permit included special condition 11. Under special condition 11, monitoring of groundwater levels and salinity in nearby wells is required, and pumping must be stopped when protective thresholds are reached. Cal-Am applied to the Coastal Commission for an amendment to special condition 11 that would allow consideration of regional influences, such as rainwater, in determining whether the pumping by the test slant well was causing changes in groundwater levels and salinity. The Coastal Commission approved Cal-Am's application for the amendment to special condition 11.

Marina Coast filed a petition for writ of mandate, which, as amended, sought a writ of mandate commanding the Coastal Commission to set aside its decision to approve Cal-Am's application for an amendment to special condition 11, as well as injunctive and declaratory relief regarding its allegations that the Coastal Commission had a pattern and practice of violating the California Environmental Quality Act (CEQA; Public Resources Code § 21000 et seq.)² and the California Coastal Act of 1976 (Coastal Act; § 30000) in

² All statutory references hereafter are to the Public Resources Code unless otherwise indicated.

its proceedings. The trial court denied the petition for writ of mandate in its entirety on November 14, 2017.

As we will further explain, we determine that as a result of subsequent events special condition 11 is no longer in effect, and therefore the appeal is moot. The appropriate disposition under the circumstances of this case is to reverse the judgment with directions to the trial court to dismiss the petition for writ of mandate as moot. (See *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134 (*Paul*); *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 944-945 (*Coalition for a Sustainable Future*).)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Test Slant Well

In 2013, Cal-Am submitted an amended application for a coastal development permit to the City of Marina. Cal-Am sought a coastal development permit in order to construct and operate a temporary test slant well on private beach property owned by CEMEX, a company that used the site for sand mining. The temporary test slant well project would include infrastructure in addition to the test slant well, such as monitoring wells and a discharge pipe.

Cal-Am stated in its application that the purpose of the temporary test slant well project was to “gather technical data related to feasibility of a subsurface intake system for a potential future desalination project. . . . The temporary slant test well data will be used, in part, to facilitate design and intake siting for the separately proposed Monterey Peninsula Water Supply Project.”

The City of Marina denied Cal-Am’s application for a coastal development permit for the test slant well, and Cal-Am appealed the denial to the Coastal Commission, which issued the coastal development permit for the test slant well in December 2014. The permit states that the coastal development permit is granted to Cal-Am for “[c]onstruction, operation, and decommissioning of a test slant well at the CEMEX sand

mining facility in the City of Marina and beneath Monterey Bay in the County of Monterey.” Several special conditions were attached to the permit, including special condition 11.

B. Special Condition 11

Pertinent to this appeal, special condition 11 states in part: “**Protection of Nearby Wells.** PRIOR TO STARTING PROJECT-RELATED PUMP TESTS, the Permittee shall install monitoring devices a minimum of four wells on the CEMEX site, within 2000 feet of the test well, and one or more offsite wells to record water and salinity levels within the wells During the project pump tests, the Permittee shall, at least once per day, monitor water and [salinity] levels within those wells in person and/or with electronic logging devices. . . . If water levels drop more than one-and-one-half foot, or if [salinity] levels increase more than two thousand parts per million from pre-pump test conditions, the Permittee shall immediately stop the pump test.”

Cal-Am applied to the Coastal Commission for an amendment to special condition 11 that would allow consideration of regional influences, such as rainwater, in determining whether the pumping by the test slant well was causing changes in groundwater levels and salinity. Pumping would be allowed to resume if the changes were not caused the by the test slant well. Over Marina Coast’s objections, the Coastal Commission approved Cal-Am’s application for the amendment to special condition 11 on October 6, 2015.

C. Marina Coast’s Petition for Writ of Mandate

In June 2016, Marina Coast filed an amended petition for writ of mandate commanding the Coastal Commission to set aside in its decision to approve Cal-Am’s application for the amendment to special condition 11. The petition also included a complaint for injunctive and declaratory relief.

The writ petition asserted four causes of action, as follows: (1) the Coastal Commission acted in excess of its jurisdiction in approving Cal-Am’s application for an

amendment to special condition 11 (Coastal Act; § 30000 et seq.); (2) abuse of process by the Coastal Commission in conducting its proceedings on Cal-Am's application to amend the coastal development permit (§ 30000; Code Civ. Proc., § 1060); (3) violations of CEQA (§ 21000 et seq.) in approving Cal-Am's application; and (4) failure to provide a 30-day review period or respond to public comments in violation of CEQA and the Coastal Act (§ 30000 et seq.).

In addition to seeking a writ of mandate commanding the Coastal Commission to set aside its approval of Cal-Am's application for an amendment to special condition 11, Marina Coast sought (1) to enjoin further action to implement the test slant well absent compliance with CEQA and the Coastal Act; (2) a declaration that the Coastal Commission had a pattern and practice of conducting unfair and improper hearings; and (3) a declaration that the Coastal Commission had a pattern and practice of conducting its proceedings illegally in violation of CEQA, the Coastal Act, and the Coastal Commission's regulations, by failing to provide a 30-day review period and failing to respond to public comments.

D. The Trial Court's Orders and Judgment

On October 20, 2016, the trial court filed an interlocutory order denying Marina Coast's writ petition as to the first cause of action (lack of jurisdiction) and the third cause of action (CEQA violations), and staying the second and fourth causes of action pending this court's decision in *Marina Coast I*.

On November 14, 2017, the trial court filed its order denying the petition for writ of mandate in its entirety. The court incorporated its prior rulings denying the petition as to the first and third causes of action, and further ruled that the petition was denied as to the second and fourth causes of action. Exercising its independent judgment, the court found that Marina Coast had failed to show that the Coastal Commission violated either CEQA or the Coastal Act in conducting its proceedings on Cal-Am's application for an amendment to special condition 11, and had also failed to show that the Coastal

Commission had a pattern and practice of committing such violations. The court concluded that “[Marina Coast] has failed to meet its burden to show any prejudicial abuse of discretion by the [Coastal] Commission. The [Coastal] Commission complied with applicable Coastal Act and CEQA requirements in considering and approving the Permit Amendment, and the [Coastal] Commission’s determinations and findings are supported by substantial evidence.”

Judgment in favor of Cal-Am and the Coastal Commission on all claims in Marina Coast’s writ petition was filed on January 11, 2018. Marina Coast filed a timely notice of appeal from the judgment.

III. DISCUSSION

On appeal, Marina Coast contends that the judgment should be reversed and a writ of mandate should issue compelling the Coastal Commission to vacate its approval of the amendment to special condition 11 until the Coastal Commission “complies with CEQA and the Coastal Act.” Marina Coast argues that the Coastal Commission failed to comply with CEQA requirements in deciding Cal-Am’s application for an amendment to special condition 11. Specifically, Marina Coast maintains that the Coastal Commission failed to provide a 30-day public review period (§ 21091), failed to provide responses to public comments raising significant environmental issues, and failed to provide an analysis of the cumulative impacts of the amendment to special condition 11 (§ 21083).

As we will discuss, we will not consider the merits of the appeal because we agree with Cal-Am that the appeal is moot.

A. Mootness

The rules governing the determination of whether an appeal is moot are well established. “It is settled that ‘the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case before it. It necessarily

follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him [or her] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]’ [Citations.]” (*Paul, supra*, 62 Cal.2d at p. 132; see also *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 215 (*MHC*) [case is moot when reviewing court’s decision can have no practical impact].)

However, the appellate court has the inherent power to retain a moot appeal under three discretionary exceptions: (1) the case presents an issue of broad public interest that is likely to recur; (2) the parties’ controversy may recur; and (3) “a material question remains for the court’s determination.” (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 480.)

B. Analysis

Cal-Am responded to Marina Coast’s appeal by filing a motion to dismiss the appeal as moot and a request for judicial notice in support of the motion. This court granted the request for judicial notice and denied the motion to dismiss without prejudice. In its motion, Cal-Am argued that the appeal was moot due to an amendment to special condition 6 of the coastal development permit for the test slant well. Marina Coast filed opposition to the motion to dismiss.

Special condition 6 originally stated, in part, that “[u]pon project completion, and no later than February 28, 2018, the Permittee shall cut off, cap, and bury the slant well head at least 40 feet below the ground surface, and shall completely remove all other temporary facilities approved by this coastal development permit.” In 2017, Cal-Am applied to the Coastal Commission for an amendment to special condition 6, which the Coastal Commission approved.

In pertinent part, the amendment to special condition 6 states: “[Cal-Am] shall complete its regular test slant well pumping operations by February 28, 2018. Thereafter,

[Cal-Am] may conduct limited periodic maintenance pumping necessary to maintain the test slant well. No later than February 28, 2019, [Cal-Am] shall cut off, cap, and bury the slant well head at least 40 feet below the ground surface, and shall completely remove all other temporary facilities approved by this coastal development permit.” (Italics omitted.)

Cal-Am argued in its motion to dismiss the appeal that the test slant well project was completed because full-time pumping ceased in 2018 pursuant to special condition 6. According to Cal-Am, special condition 11 expressly applied only to “ ‘project pumping tests,’ ” and “[b]ecause the Project’s regular pumping tests have already stopped—and no more ‘project pumping tests’ will occur—there is no relief the Court can grant. [Citations.]”

Marina Coast opposed the motion to dismiss, arguing that this court could provide effective relief by ordering the Coastal Commission to perform the environmental review mandated by CEQA for the test slant well project, and by issuing declaratory relief regarding the Coastal Commission’s illegal pattern and practice of ignoring CEQA. Alternatively, Marina Coast argued that an exception to the mootness doctrine applied, including broad public interest in Coastal Commission proceedings, the potential for recurring controversies between the parties regarding future implementation of the slant well, and the existence of material questions as to the parties’ future rights and obligations.

This court granted Marina Coast’s request for judicial notice in support of its reply brief in part, taking judicial notice of exhibit 2 to the request, the Notice of Proposed Immaterial Permit Amendment, dated October 26, 2018, as an official act of the California Coastal Commission. (Evid. Code, § 452, subd. (c).) The proposed amendment concerned special condition 6 and would extend the time for Cal-Am to conduct periodic maintenance pumping of the test slant well to February 28, 2020, at which time the test slant well would be removed.

We asked the parties to submit simultaneous supplemental briefing on three questions: (1) the current status of the slant test well project; (2) whether the appeal is moot; and (3) the general rule that the reviewing court may not issue an advisory opinion.

In its letter brief, Cal-Am advised that at the Coastal Commission's November 9, 2018 meeting the Coastal Commission approved Cal-Am's request to amend special condition 6 to allow maintenance pumping of the test slant well until February 28, 2020. Cal-Am acknowledged that "Cal-Am requested the one-year extension to allow the test well to remain in place while the City of Marina and the Commission review Cal-Am's requests for coastal development permits . . . that could authorize the conversion of the well for use as part of Cal-Am's proposed full-scale desalination plant, the Monterey Peninsula Water Supply Project."

Elaborating on its previous argument that the appeal is moot, Cal-Am asserted in its letter brief that the test slant well has been shut down except for limited maintenance pumping, and cannot be restarted or made into a production well for the desalination plant unless additional coastal development permits are approved. Cal-Am argued that since the test slant well project has been completed, and Marina Coast's appeal concerns only the amendment to special condition 11 to the coastal development permit for the test slant well, the appeal is moot and no mootness exceptions apply.

In its letter brief, Marina Coast concedes that full-time pumping of the test slant well has ceased. Marina Coast also does not dispute Cal-Am's contention that special condition 11 expressly applied only to " 'project pumping tests,' " which have been completed. However, Marina Coast argues that "[t]he main issue in this appeal is whether the Commission misinterprets the scope of its partial exemption from [CEQA] and its related obligations under its own regulations."

According to Marina Coast, the appeal is not moot because this court can issue effective declaratory relief regarding the Coastal Commission's "longstanding practice" of "not complying with CEQA's 30-day public notice requirement (. . . § 21091,

subd. (a)) or CEQA's responses to comments requirements (. . . § 21091, subd. (d)) when preparing EIR-equivalent documents." Marina Coast also contends that a live controversy exists as to the defects in the Coastal Commission's staff report regarding the environmental impacts of the amendment to special condition 11, in that the staff report may be relied on in future permit proceedings. Finally, Marina Coast urges that even if this court determines that the appeal is moot, the exceptions to the mootness doctrine apply here to address the Coastal Commission's illegal pattern and practice of not complying with CEQA requirements.

We observe that the issues raised by Marina Coast in its opening brief all concern the asserted defects in the Coastal Commission's proceedings regarding Cal-Am's application for an amendment to special condition 11, including failure to comply with the CEQA requirements for Cal-Am's application for an amendment to special condition 11, failure to provide a 30-day public review period, failure to provide responses to public comments raising significant environmental issues, and failure to provide an analysis of the cumulative impacts of the amendment to special condition 11. In its reply brief, Marina Coast also argues that declaratory relief is "necessary here, regardless of whether the court upholds the [Coastal] Commission's approval of the [coastal development permit] amendments, because of the [Coastal] Commission's pattern and practice of not complying with CEQA's 30-day public review and responses to comments requirements."

Thus, the controversy in the present case involved the merits of the Coastal Commission's approval of Cal-Am's application for an amendment to special condition 11 and whether the Coastal Commission violated CEQA in its proceedings regarding Cal-Am's application for that particular amendment. We determine that an actual controversy no longer exists, since, as Marina Coast implicitly concedes, special condition 11 as amended only applied to full-time pumping of the test slant well. Since it is undisputed that full-time pumping has ceased and cannot be restarted unless new

permit proceedings take place, special condition 11 is now inapplicable. Therefore, the appeal is moot because our decision “ ‘can have no practical impact or provide the parties effectual relief’ ” regarding either the amendment to special condition 11 or the Coastal Commission’s proceedings to approve the amendment. (See *MHC*, *supra*, 106 Cal.App.4th at p. 214.)

Absent an actual controversy, we decline to issue an advisory opinion on the issue of whether the Coastal Commission violated CEQA during its proceedings regarding Cal-Am’s application for an amendment to special condition 11, and also decline to issue an advisory opinion as to whether, on this record, the Coastal Commission has a pattern and practice of not complying with CEQA. “ ‘The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.’ [Citation.]” (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860.) In any event, we believe that any issues that may arise regarding the extent of the Coastal Commission’s obligation to comply with CEQA in deciding applications for an amendment to a coastal development permit may be determined in a future case involving an actual controversy.

Having determined that the appeal is moot, and also having declined to issue an advisory opinion, we next consider the appropriate disposition.

C. The Appropriate Disposition

The general rule is that “when a case becomes moot pending an appellate decision, ‘the court will not proceed to a formal judgment, but will dismiss the appeal.’ [Citations].” (*Paul*, *supra*, 62 Cal.2d at p. 134.) It is also the general rule that “the involuntary dismissal of an appeal leaves the judgment intact.” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 413 (*Jasmon O.*)).

In *Paul*, the California Supreme Court noted that former Code of Civil Procedure section 955 provided that “ ‘[t]he dismissal of an appeal is in effect an affirmance of the judgment or order appealed from. . . .’ ” (*Paul*, *supra*, 62 Cal.2d at p. 134.) Determining that the basis for the judgment in the case before it had “disappeared,” the *Paul* court

further determined that “we should ‘dispose of the case, not merely of the appellate proceeding which brought it here.’ [Citations.] That result can be achieved by reversing the judgment solely for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to the court to dismiss the proceeding. [Citations.] Such a reversal, of course, does not imply approval of a contrary judgment, but is merely a procedural step necessary to a proper disposition of this case.” (*Id.* at pp. 134-135.)

In 1968, Code of Civil Procedure section 955 was repealed and replaced with Code of Civil Procedure section 913, which provides that “[t]he dismissal of an appeal shall be with prejudice to the right to file another appeal within the time permitted, unless the dismissal is expressly made without prejudice to another appeal.” (Stats. 1968, ch. 385, § 2.) Although the statutory language regarding the effect of the dismissal of an appeal has changed, courts have continued to follow the ruling in *Paul* that dismissal of an appeal as moot constitutes an affirmance of the judgment. (See *Jasmon O.*, *supra*, 8 Cal.4th at p. 413.)

Courts have also continued to apply the rule set forth in *Paul* that “ ‘ “[w]here an appeal is disposed of upon the ground of mootness and without reaching the merits, in order to avoid ambiguity, the preferable procedure is to reverse the judgment with directions to the trial court to dismiss the action for having become moot prior to its final determination on appeal. [Citations.]” [Citations.]’ [Citation.]” (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 229; see, e.g., *Coalition for a Sustainable Future*, *supra*, 198 Cal.App.4th at pp. 944-945.)

We determine that a disposition under the rule of *Paul* and its progeny, rather than a dismissal of the appeal, is appropriate in the present case. “Reversal with directions to the trial court to dismiss is the equivalent of dismissal of the appeal, but avoids the ambiguity of the latter procedure which does not dispose of a subsisting trial court judgment in a case wherein the issues are moot.” (*Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 637.) Having concluded that the appeal is moot, and also having

declined to issue an advisory opinion, we will appropriately avoid affirming the judgment by implication. (See *Coalition for a Sustainable Future, supra*, 198 Cal.App.4th at pp. 944-945.)

IV. DISPOSITION

The judgment is reversed and the matter is remanded with directions to the trial court to dismiss the petition for writ of mandate as moot. There being no prevailing party, the parties shall bear their own costs on appeal.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

GREENWOOD, P.J.

DANNER, J.

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